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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 25 of the	)	
Cable Television Consumer Protection	)	MM Docket No. 93-25
and Competition Act of 1992	)	
	)	
Direct Broadcast Satellite	)	
Public Service Obligations	)	

REPLY COMMENTS OF TEMPO SATELLITE, INC.

Richard E. Wiley
Todd M. Stansbury
of
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, DC 20006
(202) 429-7000

Its Attorneys

May 30, 1997

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TEMPO Satellite, Inc. ("TEMPO") hereby submits its reply comments in the above-referenced proceeding ("NPRM") initiated by the Federal Communications Commission ("FCC") to implement Section 25 of the Cable Television Consumer Protection and Competition Act of 1992 ("Act"). TEMPO submits that maintaining the traditional approach in the DBS service of imposing flexible and minimal regulation necessary to comply with statutory mandates would best promote the Congressional objectives of distributing educational and informational programming. In particular, TEMPO urges the Commission to adopt the following proposals:

- Establish the set-aside for DBS providers at four percent;
- Calculate the amount of set-aside capacity based on the hours of unduplicated full-motion video programming, adjusted periodically;
- Facilitate program development and exposure by allowing DBS providers to count qualified programming carried on channels that contain other services;
- Construe qualified programming broadly to enable the widest variety of program suppliers to participate and thereby enhance diversity;
- Grant DBS providers flexibility to select among qualified program suppliers;
- Permit innovative relationships between DBS providers and programmers;

- Avoid excessive economic burdens on DBS service consistent with Section 25's requirement to provide access to "national educational programming suppliers" at "reasonable prices, terms and conditions;"

- Refrain from handicapping the emergence of DBS service by imposing added carriage, programming or other obligations beyond those specifically required by Section 25; and

- Construe political advertising rules to account for the unique national, multichannel nature of DBS service.

I. INTRODUCTION AND SUMMARY

In its opening comments, TEMPO demonstrated that the Commission could promote the goals of Section 25 of the Act by staying the course of minimal regulation of the DBS industry. The Commission's traditional policies have succeeded. In the past three years, new service has commenced and is finding acceptance in the marketplace. TEMPO noted, however, that less than one-half of authorized DBS permittees have begun service, and TEMPO itself launched its first satellite less than three months ago. Indeed, DBS remains a young and developing service, which the Commission previously has determined should not be shackled at the starting gate with unwarranted regulation. Accordingly, the Commission should carefully balance the need for regulation to accomplish specific legislative goals with the need to promote the continued development of DBS. Imposing only the specific and limited regulations necessary to satisfy Section 25 strikes the appropriate balance.

Despite the success of the Commission's restrained approach, a number of commenters urge the agency to ignore marketplace realities and, on the basis of unsupported assumptions, instead impose on DBS not only the maximum burdens under Section 25, but also a lengthy

list of carriage, programming and other obligations. Such a marked departure from the Commission's traditional approach to DBS would be unwarranted and unwise.

Commenters seeking the maximum seven percent set-aside of DBS capacity do not acknowledge either the early stage of development of DBS or the ability of DBS to increase the capacity that would be available for educational and informational programming through technological enhancements. Moreover, the commenters do not demonstrate that imposition of more than a four percent set-aside is required to accomplish statutory requirements.

The comments demonstrate that program diversity could be significantly enhanced by allowing DBS operators flexibility in the packaging of qualified program services creatively, and by broadly construing the types and classes of programming that may count towards the set-aside. Thus, many commenters representing programmers agree that allowing DBS providers to count discrete blocks of qualified programming on channels that also contain other types of programming would create another avenue for program providers, who may not otherwise have done so, to develop new educational and informational products. Program suppliers also argue persuasively that broadly defining qualified programmers would further the Commission's goal of enhancing diversity. Accordingly, the Commission should reject calls from competing qualified program providers and other multichannel video programming distributors seeking to handicap DBS for arbitrary limits on the definition of qualified programming.

Numerous public program providers, including APTS/PBS, support the position of TEMPO and other DBS operators that satellite providers should have the discretion to select among qualified programmers. APTS/PBS aptly notes that qualified programming "is most likely to be used in a productive manner" if DBS providers are granted such discretion.

Accordingly, the Commission should reject the request of some commenters to create an organization that would dictate program selection and scheduling.

There is broad support in the comments for the Commission to permit program providers and DBS operators to enter into joint ventures, partnerships, or other economic relationships. Innovative arrangements could assist with program financing and distribution, which would enhance program quality and diversity. DBS providers therefore should be permitted to rely on qualified programming from any bona fide program source, regardless of relationship or affiliation. TEMPO also submits that the Commission would best balance the Section 25 goal of providing access to "national educational programming suppliers" at "reasonable prices, terms and conditions" on the one hand, with the needs of DBS providers to recoup their investments, on the other, by permitting the maximum recovery allowed by statute -- the substantially subsidized rate of 50% of "direct costs."

The Commission should reject requests to set-aside additional DBS capacity for other purposes. Commenters seeking to impose a specific children's television obligation point to no failure of the DBS industry to address those needs. Indeed, it is highly probable that DBS providers will in fact provide children's programming as part of the educational and informational set-aside without the imposition of heavy-handed regulation. DBS providers already have demonstrated a substantial commitment to addressing the needs of children, including a nationwide program that provides schools with up to 19 channels of educational programming at no cost.

The Commission also should reject the requests of some commenters to impose far-reaching service, carriage, and program obligations on DBS, ostensibly to provide "regulatory parity" with cable. One commenter goes even further and suggests that the FCC mandate that

DBS essentially become a local service in order to protect "local" programming. These requests are premised on the faulty assumption that DBS is functionally indistinguishable from its traditional cable competitor. Whereas cable is fundamentally a local service, the Commission has established DBS as a national distribution source subject to a unique regulatory regime. Congress has had recent opportunities to impose additional regulatory obligations on DBS (or other emerging entrants in the multichannel video programming distribution ("MVPD") marketplace) but has not done so. Similarly, as recently as 1995, the Commission determined that burdensome service rules for DBS were unnecessary. Moreover, there is no basis in the record to support the extraordinary claim that DBS "threatens to destroy vital local programming sources." Accordingly, the Commission should maintain the distinct regulatory status of DBS and deny the requests to impose additional regulatory obligations on the service not specifically required by Section 25.

There is general agreement in the record that the Commission should craft its political advertising rules to account for the unique attributes of DBS service. The Commission should adopt the equal opportunities rules applied in cable, which require DBS providers to ensure only that candidates be provided with access to channels with similar audience sizes. Further, as a national, multichannel distribution service, DBS should be required to provide reasonable access only to candidates for national federal office. Contrary to the position of one dissenting comment, restricting access to national candidates would be appropriate for DBS service and consistent with precedent. Finally, the Commission should not dictate specific terms of program contracts by mandating that DBS operators have the right to insert advertising material in program services, as requested by one commenter. Programmers correctly contend

that such a requirement would be inimical to their "brand identities" and an unwarranted intrusion by the government into purely private transactions.

In sum, TEMPO submits that the Commission should maintain its successful approach of subjecting this developing and promising distribution technology to minimal regulatory burdens consistent with statutory requirements. Adhering to this proven policy in this proceeding would promote the wide availability of high-quality educational and informational programming at minimal administrative cost.

II. A FLEXIBLE REGULATORY APPROACH WILL FURTHER THE STATUTORY GOAL OF ENHANCING ACCESS TO A WIDE VARIETY OF EDUCATIONAL AND INFORMATIONAL PROGRAMMING

Certain commenters urge the Commission to maximize the burden on DBS operations. Some commenters with interests in qualified programming or in services competitive with DBS also desire to restrict severely the type of material that may be carried in satisfaction of the set-aside. To accomplish these aims, these commenters propose a wide array of regulatory requirements that would compel the Commission to adopt intricately detailed and burdensome rules. Contrary to the desires of some parties to promote their own particular programming (at little or no cost for carriage) or of others to handicap DBS, the Commission should adopt rules that enhance the creation and marketing of the widest variety of educational and informational material by minimizing regulatory obligations and promoting flexible arrangements in the marketplace.

A. In Light of the Early Stage of DBS Development and of Marketplace Activity, the Set-Aside Obligation Should be Limited to Minimum Statutory Requirements

The Commission should promote the continued growth and development of DBS services by establishing the set-aside at four percent. As TEMPO and others demonstrated, DBS remains in the early stages of development.[1] Consequently, the Commission should not burden DBS operators, especially those such as TEMPO with limited capacity, with a requirement to set aside any more than is mandated by statute.[2] Commenters who advocate imposition of the maximum seven percent set-aside or suggest other onerous obligations, at a time when less than one-half of all DBS systems have become operational, have not demonstrated why more than a four percent set-aside is necessary at this time to promote the development and distribution of educational and informational programming.[3] Nor do they point to any credible evidence in the record to suggest that DBS would not develop the types

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[1] Comments of TEMPO Satellite, Inc., MM Docket No. 93-25, at 2-4 (filed April 28, 1997) ("TEMPO"); Further Comments of the Satellite Broadcasting and Communications Association of American, MM Docket No. 93-25, at 2 (filed April 28, 1997) ("SBCA").

[2] A higher set-aside percentage could have a disproportionate impact on smaller DBS systems seeking to offer at least a minimum critical mass of program services to be viable in the marketplace.

[3] See Comments of DAETC, et al., MM Docket No. 93-25, at 12-14 (filed April 28, 1997) ("DAETC"); Comments of Research TV, MM Docket No. 93-25, at 12 (filed April 28, 1997) ("Research TV"); Comments of America's Public Television Stations and the Public Broadcasting Service, MM Docket No. 93-25, at 36 (filed April 28, 1997) ("APTS/PBS"). DAETC and Alliance for Community Media, et al. ("Alliance/NATOA") advocate a "sliding scale" that purportedly would increase the set-aside percentage for larger systems. DAETC at 13-14; Comments of Alliance/NATOA, MM Docket No. 93-25, at 9 (filed April 28, 1997). The proposed scale, however, would impose the full seven percent obligation on virtually all DBS providers, including TEMPO, which is authorized to operate only an eleven-transponder system.

of educational and informational services that Section 25 intends to foster without significant regulatory oversight.

In addition, the marketplace will promote increases in the capacity that will be available for educational and informational programming through the evolution of DBS technology. Thus, improvements in digital compression are expected to result in an increase in the amount of video output that can be transmitted via the same channel capacity. Since more capacity will likely become available for educational and informational programming as a result of technological advancements, imposition of the maximum possible regulatory obligations is unnecessary. Rather, the Commission's public interest objectives can be accomplished through unburdened marketplace activity.

Commenters representing cable interests predictably seek the maximum burden on DBS. Thus, certain parties urge the Commission to impose a seven percent set-aside on DBS providers in light of other carriage obligations imposed on cable operators.[4] However, there is no basis for their supposition that Congress intended Section 25 to equate cable and DBS services in this manner. Indeed, Section 25 is a narrow and discrete legislative proposal to enhance the availability of educational and informational programming on DBS systems. Other carriage obligations on cable services, such as PEG and leased access, address fundamentally different, and primarily local, concerns and do not support the imposition of a higher burden on DBS providers than is necessary to accomplish the legislative goals of

[4] Comments of National Cable Television Association, Inc., MM Docket No. 93-25, at 20-21 (filed April 28, 1997) ("NCTA"); Comments of Time Warner Cable, MM Docket No. 93-25, at 40 (filed April 28, 1997) ("Time Warner").

Section 25. The Commission should reject these requests to impose needless regulatory obligations on a new and promising distribution service.

B. The Set-Aside Should be Calculated Based on the Hour Equivalent of Video Programming Offered to the Public and Adjusted Periodically

The record demonstrates that the preferable method to calculate the amount of capacity to be set aside for each operator is to assess the hours of unduplicated full-motion video programming offered by an individual operator on a date certain, which can be updated periodically.[5] APTS/PBS agree with the satellite industry that the most feasible way to express channel capacity is in terms of "equivalent hours per day."[6] Such a measurement would be fair and readily quantifiable, and could be adjusted as DBS compression ratios and technology change. In addition, US West points out that calculating the set-aside based on the number of channels allotted or licensed, but not used to distribute services to subscribers, could "artificially force a larger set-aside, unfairly encompassing channels that are technically available but reserved for future use."[7] US West also recognizes correctly that basing the

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[5] See TEMPO at 7; SBCA at 9; Further Comments of PRIMESTAR Partners, L.P., MM Docket No. 93-25, at 15 (filed April 28, 1997) ("PRIMESTAR"); Supplemental Comments of DIRECTV, Inc., MM Docket No. 93-25, at 6, 7 n.12 (filed April 28, 1997) ("DIRECTV"); Further Comments of United States Satellite Broadcasting Company, Inc., MM Docket No. 93-25, at 7 (filed April 28, 1997) ("USSB"). TEMPO has urged the Commission to re-evaluate the capacity that an operator must set aside every two years. TEMPO at 7. TEMPO submits that a period of no less than two years is necessary to accommodate reasonably dynamic fluctuations in compression ratios on a day-to-day basis and required modifications to program line-ups. This period of time also would provide more certainty to the satellite and programming communities as to the amount of capacity that must be set-aside during the ensuing period.

[6] APTS/PBS at 40.

[7] Comments of US West, Inc., MM Docket No. 93-25, at 8 (filed April 28, 1997) ("US (Continued...)

calculation on channels used would "take[] into account changes in technology [by] allowing for advances in compression techniques."[8]

The Commission should reject requests to include in the base amount capacity used for services other than video programming.[9] As TEMPO, DIRECTV and others note, Section 25(b)(1) requires a "provider of direct broadcast satellite service providing *video programming*" to "reserve a portion of its channel capacity ... exclusively for noncommercial programming of an educational and informational nature."[10] Section 25(b)(3) also restricts the DBS provider's editorial control over "any *video programming* provided pursuant to this subsection."[11] By the terms of Section 25, Congress has expressed a concern about the availability of educational and informational video programming -- not other non-video services -- on DBS.

The logical implementation of Section 25, therefore, would base the set-aside amount on a DBS operator's video capacity, and exclude non-video material, such as program guide services, audio and data services, barker channels, and channels used for customer convenience and service administration. Center for Media Education, et. al. agrees, and

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(...Continued)
West").

[8] Id.

[9] See APTS/PBS at 39-40 n.50; DAETC at 14.

[10] 47 U.S.C. § 335(b)(1).

[11] 47 U.S.C. § 335(b)(3).

advocates excluding from the defined channel capacity "non-video services such as audio programming, data delivery and Internet connectivity."[12]

C. Flexibility in Program Placement Will Facilitate the Development and Exposure of New Products

The record reflects that public benefits accrue from defining the set-aside capacity in terms of "equivalent hours per day," as proposed by APTS/PBS. Indeed, there is substantial agreement in the record, including comments filed by parties representing programming interests, that granting satellite operators the discretion, at their option, to distribute qualified educational and informational programming during discrete blocks on channels that contain other programming would foster the development of innovative educational and informational products from a variety of programmers.[13] Thus, AHN argues that flexible rules would "afford another avenue for a variety of program suppliers, including AHN, or others who

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[12] Comments of Center for Media Education, MM Docket No. 93-24, at 9 n.28 (filed April 28, 1997) ("CME").

[13] See Comments of America's Health Network, MM Docket No. 93-25, at 6-7 (filed April 28, 1997) ("AHN"); see also APTS/PBS at 25-27, 48 n.56 (DBS providers should be permitted to negotiate with program providers "for blocks of programming"). APTS/PBS express a concern that "reasonable and useful blocks of time must be provided so that meaningful program services can be delivered...." APTS/PBS at 26. TEMPO submits that the Commission should rely upon the good faith efforts of DBS providers to accommodate the reasonable needs of program services, and that intrusive regulations specifying terms of access are unwarranted. Similarly, the Commission should not arbitrarily establish requirements that specific amounts of qualified programming be distributed on particular service tiers at this time. Significantly, Alliance/NATOA argue that "[i]deally, non-commercial channels should be interspersed throughout the provider's programming lineup." Alliance/NATOA at 8. As PRIMESTAR states, flexibility in program placement "would encourage DBS providers to seek out quality public interest programming and encourage customers to subscribe to a broader array of services." PRIMESTAR at 18.

might not otherwise do so, to provide programming."[14] Accordingly, affording reasonable flexibility in the placement of qualifying programming would yield significant public benefits.

Despite these obvious advantages, some commenters assert that DBS providers should be required to set aside specific channels. Otherwise, they argue, operators might distribute qualified programming during unfavorable viewing times.[15] To the contrary, DIRECTV notes that allowing DBS providers "to pursue innovative programming arrangements and creative packaging" would help ensure that educational and informational programming would not be relegated "to a *de facto* 'graveyard' of unwatched PEG or leased access-type channels."[16] SBCA adds that a time/hour equivalency basis is particularly important with respect to distance learning programs, where class room hours must be flexible.[17] The Commission should refrain from restricting reasonable flexibility in arranging channel line-ups so that program services can be packaged in a manner that best meets the needs of subscribers.

D. The Commission Should Promote the Creation and Distribution of Diverse Educational and Informational Programming by Fostering the Participation of the Widest Variety of Program Sources

Commenters uniformly urge the Commission to enhance the availability of diverse educational and informational programming available through the set-aside established by Section 25. While espousing this goal, however, some parties advocate positions that would,

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[14] AHN at 7.

[15] See NCTA at 22; Research TV at 12-13.

[16] DIRECTV at 2, 7-8; see also PRIMESTAR at 16-17.

[17] SBCA at 12.

in fact, promote particular programming or limit competitive opportunities for DBS providers at the expense of program diversity. The Commission should reject such attempts to narrow the scope of educational and informational programming that could be made available to the public.

For example, certain commenters, many with a vested interest in gaining access to set-aside capacity, urge the Commission to construe narrowly the classes of "national educational programming supplier" that qualify under Section 25 for set-aside capacity. These commenters argue that only the three particular *examples* of such suppliers identified in the statute should qualify.[18] Such a constrained reading ignores the plain language of Section 25 and the public policy of maximizing diversity.

Section 25 specifies that "[t]he term national educational programming supplier *includes* any qualified noncommercial educational television station, other public telecommunications entities, and public or private educational institutions."[19] By its express language, therefore, the statute merely illustrates three examples of entities which may receive access to capacity. Nothing in the language of the Act suggests that Congress intended to restrict qualified programmers to only those three classes.

Moreover, unduly limiting set-aside capacity to particular entities would be contrary to long-standing public policy of enhancing diversity.[20] Thus, as noted by program provider

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[18] APTS/PBS at 13-15; Research TV at 17.

[19] 47 U.S.C. § 335(b)(5)(B) (emphasis added).

[20] See Comments of Knowledge TV, MM Docket No. 93-25, at 9-13 (filed April 28, 1997); see also Alliance/NATOA at 7 ("diversity of voices on DBS is a government interest of the highest order").

AHN, confining the list of qualified programmers "would seriously and unnecessarily limit the variety and quality of the programming made available to viewers as part of the DBS public service obligation."[21] To promote the availability of programming from the widest variety of sources, the "Commission should focus on the educational and informational nature of the programming," and not on the particular class of provider.[22]

Some commenters also urge the Commission to exclude categorically specific educational or informational program services from qualifying for the set-aside.[23] There is no basis in the statute or public policy to support such an extraordinary request. Indeed, as noted by PRIMESTAR, services such as PBS and C-SPAN "are precisely the types of programming contemplated by Congress in enacting Section 25, and cannot legitimately be discounted in evaluating a DBS provider's compliance with its public service programming obligations."[24]

The Commission also should reject requests to impose quotas or limitations on the amount of access that may be provided to any one program provider, or alternatively, to

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[21] AHN at 5-6. See Comments of Encore Media Corporation, MM Docket No. 93-25, at 3, 5-12 (filed April 28, 1997) ("Encore"). Encore also demonstrates that Section 25(b)(3) does not mandate that only "national educational programming suppliers" may be provided access to set-aside capacity. Encore at 5-7. Rather, as provided in Section 25(b)(1), the primary obligation is for DBS providers to make available certain capacity "exclusively for noncommercial programming of an educational and informational nature." Section 25(b)(3) merely provides that a certain class of providers, "national educational programming suppliers," are entitled to receive access "upon reasonable prices, terms and conditions."

[22] See Knowledge TV at 7.

[23] See DAETC at 13 (seeking to exclude Discovery Channel, The Learning Channel, Animal Planet); US West at 8-9 (seeking to exclude C-SPAN, The Learning Channel, Discovery Channel); NCTA at 22 (seeking to exclude all "established national noncommercial services that a customer would expect to receive as part of a multi-channel package," including PBS).

[24] PRIMESTAR at 13.

guarantee access to particular classes of providers.[25] Such restrictions or requirements are wholly unwarranted. As recognized by APTS/PBS, the public interest would be served best not by arbitrarily limiting or requiring access, but by allowing providers to respond to marketplace demands with marketplace solutions. No other method or rule is necessary to ensure that the programming goals of Section 25 are promoted. Without the benefit of experience, it is simply premature for the Commission to impose rigid rules regarding the extent of access that may be permitted or required for particular providers.

E. Many Public Program Providers Agree that Allowing DBS Operators Reasonable Discretion to Select Among Qualified Programmers Would Serve the Public Interest

As TEMPO and others demonstrate, the diversity and quality of programming would be enhanced by affording DBS operators discretion to select the particular programmers granted access in satisfaction of the set-aside.[26] Such discretion would encourage a wide variety of programmers to compete in the marketplace to create quality material. Moreover, the DBS operator is in the best position to ensure that its subscribers receive program services that are designed to meet their needs.

Significantly, APTS/PBS agree that DBS operators should be granted such discretion. They persuasively argue that "[i]f any allocation issues should develop, the reserved capacity is most likely to be used in a productive manner if the DBS provider has the discretion to

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[25] See DAETC at 16-17 (limiting programmers to access to one channel, or for programmers desiring access to more than one system or who cannot fill an entire channel, limiting access to five percent of total program time capacity); Research TV at 19-22 (proposing specific channel allocations by "programmer category").

[26] See TEMPO at 13-14, PRIMESTAR at 20.

choose the noncommercial entity or entities to which the reserved capacity will be made available."[27] APTS/PBS also state that, given developments in the DBS industry regarding capacity, "there may be no significant conflict over use of the reserved capacity and thus no need to establish allocation criteria or a formal mechanism to settle allocation issues."[28] Accordingly, the Commission should reject the calls of some commenters to create a new entity that would dictate program selection and scheduling.[29] As documented by APTS/PBS, TEMPO and others, there simply is no reason to establish such a cumbersome and intrusive process.[30]

In addition, as noted in the comments, granting the DBS provider discretion to select programmers is consistent with the statutory framework of Section 25(b)(3), which prohibits providers from exercising "editorial control" over the video *programming* provided pursuant to the set-aside. As DIRECTV states, "the courts have recognized in the somewhat analogous context of the provision of Internet on-line services, a provider's status as a program 'packager,' which admittedly involves the exercise of some discretion by the provider in

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[27] APTS/PBS at 48. In 1993, APTS/PBS advocated the creation of an independent organization that could be responsible for program selection and scheduling in the event of conflicting demands for capacity. APTS/PBS no longer believe that such an entity is necessary. APTS/PBS at 46-47.

[28] Id. at 48.

[29] See Research TV at 23; Alliance/NATOA at 11; DAETC at 18-19.

[30] See APTS/PBS at 47-48; TEMPO at 13-14; PRIMESTAR at 20.

choosing which program channels to carry, generally does not rise to the level of 'editorial control.'"[31]

F. Programmers Overwhelmingly Favor Allowing Innovative Relationships Between DBS Providers and Program Services To Foster Effective Means of Financing and Distributing Programming

The record also reflects overwhelming support for flexibility in rules that would promote creative arrangements between DBS providers and program services. APTS/PBS state that "legitimate arrangements" between bona fide program suppliers and DBS providers should not be prohibited.[32] In this regard, an affiliate relationship between a DBS provider and a program supplier, per se, should not render the program service ineligible for the set-aside. This is particularly true where the program service clearly could be, or in fact is, relied upon by another DBS provider to satisfy the set-aside.[33]

Significantly, APTS/PBS and CTW support creative relationships with DBS providers. APTS/PBS and CTW ask the Commission to allow partnering and joint venturing except where the related DBS provider usurps "control of the educational user."[34] Since control is directly prohibited by the Act, the Commission has ample discretion to sanction inappropriate behavior without resorting to the complete prohibition of potentially beneficial relationships between DBS providers and programmers. As APTS/PBS state, "[s]uch joint ventures could

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[31] DIRECTV at 9. See also TEMPO at 13 n.23; USSB at 9-10.

[32] APTS/PBS at 18; see also Comments of Children's Television Workshop, MM Docket No. 93-25, at 9 (filed April 28, 1997) ("CTW") (urging the Commission to permit "partnerships and joint ventures with commercial entities").

[33] TEMPO at 12 n.18.

provide a non-profit program supplier of limited resources with a source of funding to provide additional program rights for the reserved DBS capacity."[35] Accordingly, the Commission should recognize the programming benefits that may flow from innovative undertakings between DBS providers and bona fide program suppliers, without regard to relationship or affiliation.[36]

G. Allowing DBS Providers to Recoup the Maximum, Yet Still Significantly Subsidized, Costs Under Section 25 Would Facilitate the Availability of Qualified Programming While Limiting the Burden on the Developing Industry

Certain commenters representing program and public interest groups assert that capacity must be made available to all qualified programmers at little or no cost.[37] Relying exclusively on a single sentence in the legislative history, but ignoring the plain language of the statute itself, DAETC asserts that a provider's "direct costs" of making capacity available are limited to the costs of transmitting the programming to the uplink facility and of uplinking the signal to the satellite.[38] The language of the statute, however, does not specify what

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(...Continued)

[34] APTS/PBS at 18; CTW at 9.

[35] APTS/PBS at 18.

[36] There is also significant support for the Commission to allow a DBS provider to pay the program provider for carriage rights to promote the creation of "truly valuable" programming. See APTS/PBS at 20 (Commission should not inhibit "free-market negotiations"). See also Knowledge TV at 13; AHN at 7. Therefore, the Commission also should provide for flexibility in the economic relationship between satellite operator and program provider to create and distribute qualified programming.

[37] See Research TV at 14; DAETC at 22.

[38] DAETC at 22-24; see also APTS/PBS at 23.

expenses may or shall be included. Rather, as the Commission recognized in the NPRM, the statute merely delineates certain costs which must be excluded: marketing, general administrative, and similar overhead costs.[39] The obligation is only for DBS operators to provide one class of programmers, "national educational programming suppliers," with certain access "upon reasonable prices, terms and conditions."[40]

As noted in the comments, the Commission must take into account the fledgling nature of the DBS industry. In particular, the Commission should limit the potential adverse impact on smaller operators, such as TEMPO, by allowing them to recover from "national educational programming suppliers" the maximum amount permitted by the statute, which is capped at the significantly subsidized rate of 50% of "direct costs."[41] These costs should reasonably include the proportional expense of constructing, launching and operating the satellite system, as well as the costs of making the capacity available.

H. The Commission Should Not Impose Other Set-Aside or Programming Obligations on DBS Providers Beyond the Specific Requirements of Section 25 (b)

In addition to the educational and informational set-aside required by Section 25, CME and DAETC urge the Commission to require DBS providers to reserve other capacity for specific programming intended to serve the needs of children, much like the obligations imposed on television broadcasters. CME, for example, proposes a "safe harbor" analogous

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[39] NPRM, 8 FCC Rcd at 1589.

[40] 47 U.S.C. § 335(b)(3).

[41] See TEMPO at 14-16; SBCA at 15; PRIMESTAR at 26.

to television broadcasting that would require the delivery of specific amounts of children's programming as a condition of license renewal.[42] DAETC proposes that DBS providers reserve an additional three percent of their capacity for "public interest programming," one percent of which must be dedicated to children's programming.[43] These comments presuppose the need for a solution in the absence of a demonstrable problem.

Neither DAETC nor CME points to any failure of the DBS industry to satisfy the needs of children. Nor do they allege that DBS providers will not distribute children's programming as part of the Section 25(b) set-aside. In contrast, with regard to broadcast television, which unlike DBS does not have an obligation to set aside capacity for educational and informational purposes, Congress and the Commission imposed specific requirements on over-the-air program carriage on the basis of factual findings that, according to the government, documented the necessity for regulation to ensure that a particular program need could be met.[44] Further, it is highly probable that the educational and informational programming provided by DBS operators pursuant to Section 25 will respond to the needs of a variety of viewing groups, including children. Absent a finding of a marketplace failure, there is no need at this time for the Commission to impose rigid processing rules.

Indeed, the comments contain numerous examples of DBS providers meeting the needs of children. PRIMESTAR has become an underwriter to PBS's "The Ready to Learn"

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[42] CME at 7-8.

[43] DAETC at 7.

[44] See Policies and Rules Concerning Children's Television Programming, 11 FCC Rcd 10660 (1996).

service. PRIMESTAR also has launched "PRIMESTAR Goes to School," a nationwide program which provides schools with up to 19 channels of educational programming at no cost.[45] The SBCA and its members have initiated a program to provide free installations and service to "Ronald McDonald" houses throughout the country.[46] Accordingly, in light of the demonstrated commitment of the DBS industry to provide services to meet the particular needs of children, and the affirmative obligation to set aside capacity to provide educational and informational programming, the Commission should refrain from imposing any other specific programming obligation on DBS providers.

III. THE COMMISSION SHOULD ACKNOWLEDGE THE UNIQUE NATIONAL CHARACTER OF DBS SERVICE AND REJECT ATTEMPTS TO IMPOSE ON DBS THE REGULATORY OBLIGATIONS TAILORED TO THE FUNDAMENTALLY DISTINCT AND LOCAL SERVICE OF CABLE OPERATORS

Notwithstanding the early stage of DBS development, certain commenters urge the Commission to impose on DBS providers a litany of other obligations, including service, carriage, and program requirements specific to, and to the extent the Commission maintains them for, other mass media.[47] Much of the requested regulation of DBS is beyond the scope of this proceeding and, in any event, unsupported in the record. The Commission therefore should adopt its tentative position in the NPRM to refrain from imposing any burdens on DBS beyond the specific obligations required by Section 25.

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[45] PRIMESTAR at 11-12.

[46] Id. at 11.

[47] See, generally, Comments of the Small Cable Business Association, MM Docket No. 93-25 (filed April 28, 1997) ("SCBA"); Comments of NCTA; and Comments of Time Warner.

Certain commenters ask the Commission to find that cable and DBS services are essentially functionally equivalent and, therefore, subject the services to complete regulatory parity. These calls for action are premised on the mistaken assumption that DBS would soon be in the business of retransmitting television broadcast signals to local markets and would effectively become a local service, as was proposed by the EchoStar/ASkyB transaction described in the initial comments. For example, NCTA expresses a concern that such a "'local DBS provider' would look and act just like a local cable system" but the service, "unlike cable systems, [] would shoulder almost none of the regulatory burden under current law."[48] Thus, to the extent the same rules remain in place for cable, NCTA and others seek to impose on DBS providers must-carry obligations; program access rules; channel occupancy limits; syndicated exclusivity, network non-duplication and sports blackout requirements; leased and PEG access requirements; cross-ownership prohibitions; and local taxes and other fees. The Small Cable Business Association goes even further by claiming that the "continued growth of DBS threatens to destroy vital local programming sources" and, therefore, the Commission should essentially mandate that all DBS systems become local, rather than national, services subject to all cable requirements.[49]

In establishing DBS in 1982, the Commission made clear that the service offers unique public benefits as a national, non-local service.[50] Indeed, all existing DBS operators provide

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[48] NCTA at 3.

[49] Comments of SCBA at 7. SCBA also asserts that DBS providers that choose, or are unable, to provide local service should be required to pay a percentage of gross revenues to a fund that allegedly would be used to fund "local" programming. Id. at 23-24.

[50] Direct Broadcast Satellites, 90 FCC 2d 676, 685-686 (1982); National Ass'n of Broadcasters (Continued...)

only full-continental United States service. The Court of Appeals, moreover, has agreed that Section 307(b) of the Communications Act of 1934, as amended, does not preclude authorizing a non-local service such as DBS.[51] There simply is no evidence that DBS threatens the destruction of local service to support such a compelling change in regulatory philosophy toward DBS and its benefits.

Moreover, given the national distribution scheme of DBS and the essentially local nature of cable service, the regulatory premise of NCTA and other cable commenters – i.e., that DBS and its cable competitors are functionally indistinguishable – is incorrect.[52] Indeed, NCTA acknowledges the fundamental distinction between cable systems and "non-local" DBS services and, therefore, limits its request to impose additional public interest obligations only on "local" DBS providers.[53]

DBS has been established by the Commission as a separate national distribution service subject to distinct regulatory obligations necessary to ensure that service promotes the public interest. Congress acknowledged the unique regulatory status of the service by imposing specific and limited obligations on DBS pursuant to Section 25. Moreover, Congress has had ample opportunity, including the Telecommunications Act of 1996 ("1996 Telecom Act"), to

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(...Continued)
v. FCC, 740 F.2d 1190, 1197-99 (D.C. Cir. 1984).

[51] Id.

[52] See SBCA at 3 (contrasting the "national character of DBS satellite service" with the "local and community orientation of broadcasters and cable companies").

[53] See NCTA at 4 n.6 (restricting comments regarding additional regulatory obligations to "local DBS, that is DBS service equivalent to cable service through the retransmission of local broadcast signals.").